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No. 97-1909

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MURPHY BROS., INC.,
Petitioner,

v.

MICHETTI PIPE STRINGING, INC.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF OF PETITIONER

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PARTIES TO THE PROCEEDING

All parties to the proceedings in the Court of Appeals are reflected in the caption of the case.

RULE 29.1 LISTING

Petitioner, Murphy Bros., Inc., has no parent corporation nor any nonwholly owned subsidiaries.

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ARGUMENT

The issue in this case is whether service of process is a necessary prerequisite to the commencement of the thirty day removal period. Michetti argues that Murphy is inviting the Court to "rewrite Congress's language to read, 'The notice of removal of a civil action or proceeding shall be filed within thirty days after service of process of the initial pleading.'" (Brief for Respondent, p.7). Indeed, Michetti's entire argument is focused upon refuting the idea that service, rather than receipt, is the event that triggers the removal period.[1] Murphy, however, does not contend that the statute requires service *rather* than receipt. Murphy's position is that *both* service *and* receipt are required to trigger the removal period.[2]

Michetti suggests that the equities are not in Murphy's favor in this case. If weighing the equities is the standard for determining the timeliness of removal, then this case should be remanded to the district court to weigh the equities after conducting an

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[1] Because Michetti misinterprets Murphy's position, much of its argument is misdirected. Michetti claims, for example, that a service rule interpretation would "excise" the alternative commencement provision contained in the second phrase of §1446(b). To the contrary, if the statute requires service and receipt, the alternate provision would still be necessary in order to deal with those jurisdictions like Kentucky "where suit is commenced by the filing of the plaintiff's initial pleading and the issuance and service of a summons without any requirement that a copy of the pleading be served upon or otherwise furnished to the defendant" at any time. H.R.Rep. No. 352 (March 30, 1949), *reprinted in* 1949 U.S.C.C.S. 1248, 1268. Without this alternative commencement provision, the removal period might *never* begin to run in such a jurisdiction. *Id.*

[2] Notwithstanding the implications of the titles "service rule" and "proper service rule," the cases require both service and receipt. *See Apache Nitrogen Products, Inc. v. Harbor Ins. Co.*, 145 F.R.D. 674, 679 (D.Ariz. 1993)("the removal period does not commence until process has been served *and* a copy of the initial pleading has been provided, whether it be through service 'or otherwise'").

evidentiary hearing.[3] The equities are not at issue here, however. The issue in this case was decided by both the district court and the court of appeals as purely a legal issue — not an equitable one.

As demonstrated in Murphy's principal brief, the service rule interpretation is consistent with the history of the statute; it prevents conflicts with other statutes; and it comports with notions of fundamental fairness upon which the removal statutes are based. It is the correct interpretation of § 1446(b).

I. The language of 28 U.S.C. § 1446(b) is ambiguous.

Predictably, Michetti argues that § 1446(b) is clear and unambiguous. Focusing the Court's attention on the phrase "receipt .... through service or otherwise," Michetti claims that the "plain meaning" of the statute precludes any judicial interpretation. However, rules of statutory interpretation require that the Court look beyond this one phrase and consider all the language of § 1446(b), as well as the removal statutes as a whole. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997); *Bob Jones University v. United States*, 461 U.S. 574, 586 (1983). When

[3] Michetti suggests that Murphy's knowledge of its right to remove tips the balance of the equities in its favor. To the contrary, the fact that Murphy knew of and expressed its intent to remove the case to federal court clearly demonstrates the *inequity* of the situation. Murphy assumed, like most litigants and many lawyers would, that it did not have to take any action to protect its interests in relation to Michetti's suit until service of process was perfected. Certainly, it had a reasonable basis for so assuming. After all, one of the fundamental precepts of our legal system is that a court cannot exercise jurisdiction over a defendant, nor may a defendant's rights be prejudiced, until the court acquires personal jurisdiction over the defendant via service of process. Moreover, Michetti led Murphy to believe that it had filed this suit only to protect its interests and that it wanted to continue to discuss a resolution of the parties' dispute. Taking Michetti at its word, Murphy continued with settlement negotiations until it was served with process and refused to negotiate further. Michetti certainly would not prevail in a battle of the equities.

viewed in this context, the meaning of § 1446(b) is anything but plain.

The meaning of the statute is unclear in many respects. Most significantly, the intended meaning of "defendant" is uncertain. If used broadly, "defendant" means any party the plaintiff names in the complaint. If used narrowly, "defendant" means only named parties who have been formally joined as defendants by service of process, as the term is utilized in § 1441(b). Indeed, Webster's dictionary defines "defendant" as "the defending party" or, more broadly, as "one who is sued or accused." Webster's New Twentieth Century Dictionary Unabridged (2d ed. 1979). Because the term "defendant" is reasonably susceptible of either meaning in the context of § 1446(b), ambiguity exists.

In its attempt to discount as "mere hyperbole" what it dubs the "parade of horribles" that could result from the receipt rule, Michetti actually highlights other ambiguities of the statute.[4] For example, Michetti states that "Sending a copy to an unauthorized employee of a corporate or governmental party would be improper "receipt" under Federal Rule of Civil Procedure 4." (Brief for Respondent, p. 8). Section 1446(b) does not limit "receipt" by a corporate or governmental party to those circumstances meeting Rule 4's requirements.[5] Michetti also notes that "if a defendant were to find a copy of the complaint on either a curb or a website, the defendant would not have actively

[4] Interestingly, Michetti does not hesitate to embellish the language of the statute in its attempts to demonstrate why the "parade of horribles" are not so horrible, though it roundly criticizes Murphy's interpretation as improperly "adding" language to the statute.

[5] Rule 4 addresses service of process, specifying that "[a] summons, or copy ..., shall be issued for each defendant to be served," Fed. R. Civ. P. 4(b), and that the "*summons shall be served* together with a copy of the complaint." Fed. R. Civ. P. 4(c)(1) (emphasis added). If the requirements of Rule 4 are incorporated into section 1446(b), then service of process should be required.

"recei[ved] a copy of the complaint from the plaintiff; mere passive discovery would not suffice." (Brief for Respondent, p. 8). Nothing in the statute requires that the defendant "actively" receive a copy of the complaint "from the plaintiff." The term "receive" does not necessarily imply such a requirement. *See* Webster's New Twentieth Century Dictionary Unabridged (2d ed. 1979)(defining "receive" as "to take into one's possession"; "to get"; "to acquire"). While Michetti's proposed interpretations may be reasonable, they do not flow necessarily from the language of the statute.

In short, the language is susceptible of more than one meaning — it is ambiguous. *Guinness Import Co. v. Mark VII Distributors, Inc.*, 153 F.3d 607, 611 (CA8 1998)(a statute is ambiguous if it is reasonably susceptible of more than one interpretation). *See also* Webster's New Twentieth Century Dictionary Unabridged (2d ed. 1979)(defining ambiguous as "having two or more possible meanings; . . . susceptible of different interpretations; hence, obscure; not clear; not definite; uncertain or vague"). These ambiguities require that the Court examine all available sources of information to ascertain the statute's intended meaning. *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974).

II. The legislative history of 28 U.S.C. § 1446(b) and the historical context in which the 1949 amendment was adopted indicate that Congress intended to require both service of process and receipt before the time period for removal commences.

Michetti argues that the legislative history of section 1446(b) supports the receipt rule interpretation, but in so doing, Michetti so jumbles and confuses the legislative history that it is virtually unrecognizable.[6] Michetti quotes from various portions of the

[6] Those portions of the legislative history of the 1948 revision and the 1949 amendments to Title 28 which refer to section 1446(b) are reproduced in their entirety in the appendix to Murphy's principal brief at pages A-3 - A-7.

legislative history that address different and distinct aspects of the statute[7] and concludes from its mis-connection of these snippets from the legislative history that the 1949 amendment substitutes "'receipt' of notice" for service of process. (Brief for Respondent, pp. 10-11). Neither the statute nor its history suggests that "either actual or constructive notice" is generally sufficient to trigger the time period," as Michetti suggests. Indeed, under the language of the statute "notice" is sufficient only in the narrow circumstance where service of a summons has been perfected, the complaint has been filed and the complaint is not required to be served on the defendant.[8] Aside from that narrow circumstance, actual receipt of the complaint is required. Nothing in the legislative history indicates that Congress intended or foresaw that the removal period could commence prior to service of process.

The goal of the 1948 revision to section 1446(b) was to establish a uniform time period within which the right of removal must be exercised. If divorcing removal from the procedural variations of state service of process rules had been Congress' aim, it certainly would not have tied the removal period to commencement or service under state law. Congress soon

[7] Michetti states, for example:

> Congress rewrote § 1446(b) in 1949 to substitute "receipt" of notice for "service of process". As the House explained, "this amendment . . . indicates that notice need not be given simultaneously with the filing, but may be given promptly thereafter. [H.R. Rep. 81-352 (1949), *reprinted in* 1949 U.S.C.C.A.N. 1254, at 1268]

(Brief for Respondent, p. 10). Though the point of this argument is unclear, the extent to which Michetti tortures the legislative history is not. The quoted section of the House Report addresses an amendment to § 1446(e) [which is now 1446(d)] dealing with notifying adverse parties of the removal. *See* A-7.

[8] The number of entries in the "parade of horribles" increases exponentially as Michetti's proposed interpretation shifts from actual receipt to constructive notice.

realized, however, that the time period was not uniform under the 1948 revision because in jurisdictions such as New York where a case could be commenced by serving the defendant with a summons without filing or serving a complaint, the removal period could expire before the defendant had received a copy of the complaint from which he could determine whether the case was removable. Consequently, the 1949 amendment was effected to assure that defendants in "New York rule" jurisdictions, like defendants elsewhere, would be afforded twenty days to decide whether to remove.

Thus, like the 1948 revision, the 1949 amendment was aimed at achieving uniformity in the time *period* for removal. The intent of the amendment was not to sever all ties to state service of process rules, as Michetti suggests. The service rule interpretation of the statute, therefore, does not thwart congressional intent. In fact, it is the receipt rule that runs counter to congressional intent because it accelerates the commencement of the removal period when a named defendant receives the complaint prior to service, when the purpose of the amendment was to delay commencement of the period in "New York rule" cases. In short, the 1949 amendment was not intended to dispense with service of process as a prerequisite to removal, but simply to add receipt as an additional requirement.[9]

[9] Michetti notes that Congress understood that the 1949 amendment would effect a "major" change in the law. (Brief of Respondent, p.11). The amendment to § 1446(b) was a "major" change in the context of the 1949 legislation only because it actually modified the law, whereas the great bulk of the 174 changes that were made through the legislation merely corrected clerical and typographical errors or revised language to conform more closely to former law. S.Rep. No. 303 (April 26, 1949), *reprinted in* 1949 U.S.C.C.S. 1248, 1252.

III. Interpreting § 1446(b) to require service and receipt avoids conflicts with other removal statutes and with the Federal Rules of Civil Procedure.

As noted previously, the phrase "parties in interest properly joined and served as defendants" in § 1441(b) suggests that the term "defendant" in § 1446(b) includes only those named parties who have been joined as parties defendant via service of process. Michetti disagrees, claiming that Congress' use of the term "defendant" in § 1441(b) is not indicative of the meaning of that term in § 1446(b).[10] Michetti claims that to substitute the § 1441(b) definition of "defendants" (parties in interest who have been properly joined and served) into §1446(b) renders the statute nonsensical. To the contrary, though the substituted language makes the wording of the statute somewhat cumbersome, the meaning is infinitely clear — a named party need not remove until thirty days after he has been properly joined and served as a defendant *and* has received a copy of the complaint. Moreover, the fact that the definition of a word used in a statute cannot be substituted into the statute itself without rendering the wording of the statute awkward attests only to the drafter's wisdom in using the word rather than its lengthier definition.

Michetti addresses the requirement of complete diversity between all named plaintiffs and named defendants for purposes of diversity jurisdiction. The significance of this discussion is unclear, but Michetti seems to suggest that the complete diversity requirement of diversity jurisdiction necessarily dictates

[10] Michetti suggests that because Congress included "proper joinder and service to modify 'defendant' in § 1441(b) but excluded those same modifiers in § 1446(b)," Congress intended that the meaning of "defendant" in § 1446(b) be broader than in § 1441(b). Michetti's argument is misdirected, however, because the phrase "properly joined and served" does not modify "defendant" in § 1441(b). The phrase "properly joined and served as defendants" modifies "parties in interest."

that the term "defendant" in § 1446(b) includes all parties named as defendants. Such a position might have some logical basis if the diversity statute used the term "defendant" in defining diversity jurisdiction, but it does not. Rather, the statute defines diversity jurisdiction in terms of a controversy between citizens of different states. See 28 U.S.C. § 1332. Whether unserved defendants must be considered in determining the procedural limitations on removal is an issue separate and distinct from the scope of diversity jurisdiction.

Michetti also seems to suggest that the language of § 1441(b) should be disregarded because it has no practical realm of operation within the limitations of diversity jurisdiction. Michetti argues that *Pullman Co. v. Jenkins*, 305 U.S. 534 (1939), stands for the proposition that "diversity of citizenship does not exist where a resident co-defendant is named in the complaint" and that the provisions of § 1441(b) do "not alter the more general requirement of complete diversity imposed by § 1441(a)" and original diversity jurisdiction. (Brief for Respondent, p. 14). Michetti concludes that "[t]his holds true even where the resident defendant is unserved at the time of removal, because diversity would be lacking despite the flaw in service." (Brief for Respondent, p. 15). Michetti's apparent conclusion that the final sentence of § 1441(b) has no realm of operation is flawed because Michetti's premise is flawed. *Pullman* does not hold that diversity jurisdiction does not exist if a resident defendant is named in the complaint. It holds that when the *plaintiff* is a resident of the forum state, the presence of an unserved resident defendant defeats diversity jurisdiction because complete diversity does not exist. Where the plaintiff is *not* a resident of the forum state, the presence of a resident defendant does not defeat diversity jurisdiction, though it is a *procedural* bar to removal if that resident defendant has been "properly joined and served as a defendant." Plainly, the last sentence of § 1441(b) has a realm of operation separate and apart from the jurisdictional limitations on diversity jurisdiction.

Contrary to Michetti's position, Congress' use of the term "defendants" in the narrow sense of "parties in interest properly joined and served" certainly is significant in determining the intended meaning of "defendant" in § 1446(b). *C.I.R. v. Lundy*, 516 U.S. 235, 250 (1996)(the same words in different parts of the same act are intended to have the same meaning). At the very least, it highlights an ambiguity in the removal statutes. More probably, it defines the intended scope of the term "defendant" in § 1446(b).

The conflict that the receipt rule creates between § 1446(b) and Rule 81(c) also demonstrates that the receipt rule is not the proper interpretation of § 1446(b). Michetti does not dispute that the receipt rule interpretation of Rule 81(c) might require a defendant who exercises its removal rights to file a responsive pleading in federal court prior to service of process. (Brief for Respondent, p. 18). However, Michetti contends that this presents no problem because the defendant can file a Rule 12 motion challenging the sufficiency and adequacy of process.[11] Michetti completely misses the point. Requiring that a defendant make any response to a complaint, whether by way of answer or Rule 12 motion, is contrary to the long-accepted precept that a defendant is not required to do anything until he has been brought

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[11] Michetti claims that there are no due process implications to the receipt rule, claiming that Murphy and the amici confuse service of process with personal jurisdiction. However, service of process is the mechanism by which the court acquires personal jurisdiction over a defendant. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Absent service of process, the court cannot exercise personal jurisdiction consistent with due process. *Omni Capital Int'l v. Ruldolf Wolff & Co., Ltd.*, 484 U.S. 97, 104 (1987)("Before a court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied."). Certainly, there are due process implications if a court may exercise jurisdiction over a defendant prior to service of process by requiring him to respond to a complaint or suffer default. No such concerns arise with respect to the service rule interpretation.

within the jurisdiction of the court via service of process. Certainly, there is no suggestion in the legislative history that the concurrent amendments to § 1446(b) and Rule 81(c) were intended to abrogate this principle. As the Seventh Circuit has noted:

> [N]othing in the statute, the rule or their respective legislative histories ... would justify our concluding that the drafters ... intended to abrogate the necessity for something as fundamental as service of process. It simply is not reasonable for us to conclude that it was intended that such a major exception to the clear mandates of Rules 4 and 12 be undertaken without any express mention of such a consequence. . . . Requiring a responsive pleading before service is effected is at odds with a fundamental principle of federal procedure — that a responsive pleading is required only after service has been effected and the party has been made subject to the jurisdiction of the federal courts. ... Only a court that has jurisdiction over the defendant may require that the defendant state its substantive position in the litigation.

Silva v. City of Madison, 69 F.3d 1368, 1376 (CA7, 1995), *cert. denied*, 517 U.S. 1121 (1996) (citations and footnotes omitted).

Rule 81(c) clearly was not intended to dispense with the requirement of service of process, so the receipt rule cannot be the proper interpretation of Rule 81(c). Because the relevant language was added to the statute and the rule contemporaneously to make the two consistent, logic dictates that the language must be interpreted the same. Consequently, the receipt rule cannot be the proper interpretation of § 1446(b) either.

IV. The service rule interpretation of § 1446 is consistent with the language of the removal statute and the purpose and intent of Congress; it avoids conflicts with other removal statutes and the Federal Rules of Civil Procedure; and it comports with notions of fairness upon which the right of removal is grounded.

All relevant factors indicate that the service rule is the proper interpretation of § 1446(b). The language of the section, when considered in the context of the other removal statutes, indicates that service of process is a necessary prerequisite to the commencement of the removal period. Moreover, this interpretation is most consistent with the history of the statute and with the purpose for which the statute was amended. The service rule promotes consistency and avoids friction with other statutes and comports with notions of fundamental fairness upon which the removal statutes are based. The service rule is also the interpretation that is clearest and most easily understood and applied.

CONCLUSION

For the reasons stated herein and in Petitioner's principal brief, Petitioner requests that the Court reverse the decision of the court of appeals and that the case be remanded for further proceedings in the district court.

Respectfully submitted,

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